SARATAH SIVALINGAM v. REETHA RAMUDOO

HIGH COURT MALAYA, KUALA LUMPUR
GAN TECHIONG JC
[CIVIL SUIT NO: WA-23NCVC-23-04-2024]
25 JULY 2024

Abstract – *An application for an interlocutory injunction must be adequate to protect the applicant pending resolution of the substantial matter. Hence, in allowing an application for an interlocutory injunction, the court should take whichever course that appears to carry the lower risk of injustice, in that, the injunction granted should not be oppressive to the party in opposition.*

CIVIL PROCEDURE: *Injunction – Interlocutory injunction – Tort of harassment – Messages and emails with profanities allegedly received by plaintiff – Plaintiff and family being stalked by defendant at various locations – Harassment caused plaintiff post-traumatic stress disorder – Whether plaintiff shown serious bona fide issues to be tried – Whether balance of convenience and justice of case in favour of plaintiff – Whether damages would be adequate remedy if plaintiff succeeds*

The defendant was a former employee of MSK Film Production Sdn Bhd, a company founded by the plaintiff's husband. The plaintiff, in her application for a wide-ranging injunction against the defendant, pleaded that she was a victim of various forms of harassment. The plaintiff averred that: (i) she had been receiving numerous vulgar messages from different mobile phone numbers, along with abusive emails which she believed had either been sent by the defendant or arranged by the defendant in cahoots with the ex-wife of her husband; (ii) despite blocking those mobile phone numbers, from which the harassment was transmitted, the sender continued to harass her by using new mobile phone numbers to send obscene and abusive messages. The emails sent to the plaintiff's personal and company email addresses – which were read by her colleagues – had caused her great embarrassment in her office and intensified the distress that she had been suffering since year 2022, when the harassment began; and (iii) the defendant had stalked her and her family on multiple occasions, at various locations, including a car park, the plaintiff's home and the vicinity of her office. The harassment continued unabated despite police reports being lodged. The plaintiff averred that she had been diagnosed with post-traumatic stress disorder ('PTSD'), a condition exacerbated by the incessant harassment that she had been suffering and hence, underscored the urgent need to protect her safety and mental health as well as that of her children.

Held (allowing application for interlocutory injunction in part):

(1) If a plaintiff has affirmed under oath, stating with a high degree of certainty that a defendant is the sender of profanities and abusive messages, this court may act on that affidavit evidence, subject to undertaking to pay damages, to consider issuing an interlocutory injunction to prohibit the defendant from further sending such messages. Since the plaintiff had affirmed under oath that she recognised the voice to be that of the defendant, the plaintiff would have to face the consequences if it turns out during the trial that the voice in the audio messages was very different from the defendant's voice and in fact not hers. Likewise, the issue of whether the defendant did stalk the plaintiff and her family – whether she was deliberately there to stalk or coincidentally there on those occasions when the plaintiff discovered the 'stalking'. For the purpose of the plaintiff's application for an interlocutory injunction, the plaintiff had shown serious *bona fide* issues to be tried. (paras 24-27)

(2) The balance of convenience and the justice of the case favoured the plaintiff because the evidence showed that she was suffering from PTSD. If the culprit who sent those harassing messages was not the defendant, the prohibitory injunction would have no effect over her at all. The 'damage' that the defendant would suffer would be adequately compensated by an inquiry into damages pursuant to the plaintiff's undertaking to pay damages if so ordered by this court in the future, and an order for costs on indemnity basis to be paid to her by the plaintiff. (para 28)

(3) Damages would not be an adequate remedy for the plaintiff if she succeeded in proving her claim against the defendant. If the defendant was the sender of those profanities and was not restrained by an injunction pending the trial of this action, the psychiatric ailment that the plaintiff had been suffering might reach an irreversible stage if the harassment was to continue unabated. It would be very difficult to assess the mental harm done to the plaintiff and her young children at the trial. The balance of convenience was certainly in favour of the issuance of an interlocutory injunction. However, if the defendant was not the culprit who sent those harassing messages, the prohibitory injunction would have no effect on her at all. (paras 29 & 30)

(4) Protection of the plaintiff and her children must be balanced with the need to avoid punishing the defendant. The court should take whichever course that appears to carry the lower risk of injustice. It would be oppressive of the defendant if all the prayers in the plaintiff's application were to be allowed. The interlocutory injunction to be issued must be adequate to protect the plaintiff and her children pending the trial of this action but, it must not amount to an 'overkill', so much so that it stifles

the defendant's life and activity unnecessarily. Hence, the court allowed interlocutory injunction that restrained the defendant (i) from causing any harassment, nuisance or intimidation to the plaintiff and her children; and (ii) from approaching, contacting or communicating with the plaintiff or her children, whether directly or indirectly, whether through a telephone or electronic mail or any other social media platform. (paras 32-35)

Case(s) referred to:

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors [1995] 1 CLJ 461 FC ***(foll)***

Keet Gerald Francis Noel John v. Mohd Noor @ Harun Abdullah & Ors [1995] 1 CLJ 293 CA ***(refd)***

Khorasandjian v. Bush [1993] QB 727 ***(refd)***

Malcomson Nicholas Hugh Bertram & Anor v. Naresh Kumar Mehta [2001] 4 SLR 454 ***(refd)***

Mohd Ridzwan Abdul Razak v. Asmah Hj Mohd Nor [2016] 6 CLJ 346 FC ***(foll)***

For the plaintiff - Parameswaran Subramaniam & K Selva; M/s S Param & G Thila
For the defendant - Adiishyiah Tangarajoo; M/s M Manoharan & Co

Reported by S Barathi

JUDGMENT

Gan Techiong JC:

Introduction

[1] Profanities. That word best describes the obscene messages that the plaintiff had received. The plaintiff pleaded in her statement of claim that those messages were sent by the defendant by using different mobile phone numbers.

[2] Those profanities are too foul to appear *verbatim* in a judgment of this Honourable Court. Anyone with access to the affidavits filed by the plaintiff would be able to read the exact words used. For the purpose of justifying the injunction, I would sum up those words, *inter alia*, as allegations that the plaintiff's husband had performed lurid sexual acts with the sender.

[3] In her statement of claim and affidavit, the plaintiff also averred that she and her family were stalked by the defendant on multiple occasions at various locations, including at a car park, the plaintiff's home and her office.

[4] The plaintiff had filed an *ex parte* application for a wide-ranging injunction against the defendant. I declined to hear it *ex parte* as there was no necessity for it to be kept under wraps to ensure that any injunction to be issued would not be defeated by pre-emptive action – which might occur, for, *eg*, if it is for a *Mareva* injunction. The said application (encl. 4) was served on the defendant, who was given ample time to file her affidavit in reply.

[5] After an *inter parte* hearing of the plaintiff's application, I decided to allow only prayer (2)(a) and (d) in the plaintiff's application, and not all the prayers sought by the plaintiff. This court issued an interlocutory injunction against the defendant to restrain her from disturbing the plaintiff and her family but does not cover the plaintiff's husband – whom I believe does not require the protection of an interlocutory injunction. An excerpt of the sealed order is reproduced below to show the exact terms of the interlocutory injunction that was ordered by this court:

> 1. Satu Injunksi Interim diperintahkan untuk menghalang Defendan, sama ada secara sendiri atau melalui pengkhidmat atau ejennya atau dengan apa cara sekalipun, dari melakukan mana-mana perbuatan berikut:
>
> (a) Menyebabkan atau membenarkan gangguan (harassment), kacau ganggu (nuisance) atau ugutan (intimidation) terhadap Plaintif dan 3 orang anak Plaintif sahaja, yakni Sivesh Kalaiselvan, Kavisha Kalaiselvan dan Mounisha Kalaiselvan ('ahli keluarga Plaintif')
>
> (b) Mendekati, menghubungi atau berkomunikasi dengan Plaintif dan ahli keluarga Plaintif kecuali suami Plaintif, sama ada secara langsung atau tidak langsung, sama ada melalui telefon atau e-mel atau apa-apa platform media sosial dan sebagainya.
>
> 2. Perintah Injunksi Interim ini akan berkuatkuasa sehingga pelupusan guaman sivil ini atau perintah selanjutnya; dan
>
> 3. Kos permohonan adalah dalam kausa.

[6] My reasons for issuing the aforesaid injunction, which is to be in force until the disposal of this civil suit or further order, are as stated below.

Background Facts

[7] The defendant is a young Malaysian woman. She was a former employee of a company known as MSK Film Production Sdn Bhd.

[8] MSK Film Production Sdn Bhd is a company founded by the plaintiff's husband, whose name is Kalaiselvan Sivagnanam.

[9] The exact date and circumstances leading to the defendant's dismissal from MSK Film Production Sdn Bhd are unclear.

The Plaintiff's Grounds For Seeking An Interlocutory Prohibitory Injunction Against The Defendant

[10] The plaintiff has pleaded that she is the victim of various forms of harassment. She avers that since 2022, she has been receiving numerous vulgar messages from different mobile phone numbers, along with abusive emails. She believes that all those profanities and emails were either sent by the defendant or arranged by the defendant in cahoots with the ex-wife of her husband.

[11] Besides vulgar WhatsApp messages and abusive emails, the plaintiff also accuses the defendant of stalking her and her family. The plaintiff has three children whom she feels must be protected.

[12] The plaintiff further avers that she is compelled to sue the defendant and apply for an interlocutory injunction because despite her blocking those mobile phone numbers from which the harassment was transmitted, the sender has continued to harass her by using new mobile phone numbers to send obscene and abusive messages.

[13] The plaintiff further avers that those emails sent to her personal and company email addresses – which were read by her colleagues – have caused her great embarrassment in her office and intensified the distress that she has been suffering since the year 2022 when the harassment began.

[14] It is also pleaded by the plaintiff that the defendant has stalked her and her family on multiple occasions, at various locations, including a car park, the plaintiff's home and the vicinity of her office. Despite police reports being lodged, the plaintiff complains that the harassment has continued unabated.

[15] The plaintiff is certain that the defendant is the mastermind of the aforesaid harassment because she could identify the defendant's voice when she listened to vulgar and abusive audio messages that were sent to her.

[16] In order to justify her application for an interlocutory injunction, the plaintiff avers that she has been diagnosed with post-traumatic stress disorder ('PTSD'), a condition exacerbated by the incessant harassment that she has been suffering. The plaintiff underscores the urgent need to protect her safety and mental health as well as that of her children. She asserts that the balance of convenience favours the granting of an injunction. She is concerned that the absence of such relief would result in severe and irreversible harm to her and her family.

The Defendant's Grounds For Objecting To An Interlocutory Injunction

[17] The defendant denies being the person who has harassed the plaintiff and her family, averring that if she was the culprit, the plaintiff's husband Kalai would not have continued to keep in touch with her by telephone calls as well as WhatsApp calls and messages. She adduced as evidence exhibited in her affidavit, screenshots showing messages and missed calls, to prove that the plaintiff's husband was in touch with her even in year 2024.

[18] The defendant further avers that she is in fact the victim because she was dismissed from MSK Film Production Sdn Bhd and was assaulted by the plaintiff's husband. She also alleges that MSK Film Production Sdn Bhd still owes her outstanding salary.

A **Analysis Of The Facts And Law**

[19] First, on the plaintiff's cause of action, it is obviously a tortious one. Though the existence of the tort of public nuisance is well-settled, the tort of harassment is relatively new jurisprudence in Malaysia. It was first explicitly introduced into our legal and judicial system by the Federal Court
B in *Mohd Ridzwan Abdul Razak v. Asmah Hj Mohd Nor* [2016] 6 CLJ 346; [2016] 4 MLJ 282 only about eight years ago, in 2016.

[20] The relevant passages in *Mohd Ridzwan Abdul Razak* (*supra*) that explain the learned Federal Court Judges' decision to import the tort of harassment into the legal system in Malaysia, its history in England and
C Singapore, and the definition of "tort of harassment", are as follows:

> [39] After mulling over the matter, we arrived at a decision to undertake some judicial activism exercise and *decide that it is timely to import the tort of harassment* into our legal and judicial system, *with sexual harassment being part of it*.
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> D
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> [40] So, what should constitute definitive sexual harassment? Assistance may be sought from the 1999 Practice Code, in particular article 4, which describes sexual harassment in the following manner:
>
> *any unwanted conduct of a sexual nature* having the effect of verbal, non-
> E verbal, visual, psychological or physical harassment;
>
> (i) that might, on reasonable grounds, be perceived by the recipient as placing a condition of a sexual nature on her/his employment; or
>
> (ii) that might, on reasonable grounds be perceived by the recipient as an offence or humiliation, or a threat to her/his well-being, but has
> F no direct link to her or his employment.
>
> ...
>
> [48] Tort law in our country is still very much based on English common law principles (s. 3(1) of the Civil Law Act 1956). Although the courts in Malaysia, as in Singapore are not bound by decisions of English Courts,
> G decisions of the highest court in England are highly persuasive (*Pang Koi Fa v. Lim Djoe Phing* [2016] 4 MLJ 282 at 294; [1993] 3 SLR 317).
>
> [50] In *Patel v. Patel* [1988] 2 FLR 179, Waterhouse J when sitting as the second judge in the Court of Appeal had occasion to state that there was no tort of harassment in England then. A brief respite was seen when in
> H *Khorasandjian v. Bush* [1993] QB 727, by a majority, the Court of Appeal held that the daughter who held no proprietorial interest over the property was entitled to litigate in that case. There the daughter was deluged by harassing and pestering telephone calls (the primary complaint being harassment rather than private nuisance). Dillon LJ after referring to Waterhouse J of *Patel v. Patel* (above) doubted that there was no tort of
> I harassment. *Burris v. Azadani* [1995] 4 All ER 802 later also doubted the position of Waterhouse J.
>
> ...

[52] *The uncertainty in England as regards the tort of harassment is rescued by the existence of English legislation in the like of the Protection from Harassment Act 1997* (providing protection from harassment and similar conduct) and the Protection of Freedoms Act 2012 (creating offences for stalking as distinct from harassment). Lord Hoffmann in *Hunter And Others v. Canary Wharf Ltd* pointed out that if not for these statutory protections for victims of harassment, the common law might have developed the tort of harassment.

[53] In Singapore, in the case of *Malcomson Nicholas Hugh Bertram & Anor v. Naresh Kumar Mehta* [2001] 4 SLR 454 the plaintiff had filed an action against the defendant as he had been harassed and pestered, especially at his place of work. In that action the plaintiff prayed for damages and an injunction against the defendant. Despite the defendant not having entered his defence, the learned judicial commissioner still had to overcome various legal obstacles before arriving at a decision. At that point of time (2001) there was no recognisable tort under which the plaintiff could have successfully sued the defendant. The plaintiff could not sue under trespass as there was no physical contact and *Wilkinson v. Downton* was found to be equally inapplicable. The plaintiff had not suffered any bodily harm or any psychiatric illness. The learned judicial commissioner also made a finding of fact that the tort of private nuisance was inapplicable in that case. The judicial commissioner could easily have taken the easy way out by dismissing the suit, but despite those constraints, with judicial justification introduced the new tort of intentional harassment. The learned judicial commissioner in the course of introducing the latter *tort defined harassment to mean*:

> ... *a course of conduct by a person*, whether by words or action, directly or through third parties, *sufficiently repetitive in nature* as would cause, and which he ought reasonably to know would *cause, worry, emotional distress or annoyance to another person*.

[59] After taking into consideration the above cases, empirical studies, and our personal researches, *the recognisable hallmarks of sexual harassment are that they are unwelcome, taking the form of verbal and even physical, which include sexual innuendos, comments and remarks, suggestive, obscene or insulting sounds, implied sexual threats, leering, ogling, displaying offensive pictures, making obscene gestures etc*.

(emphasis added)

[21] In summary, the tort of harassment has been recognised in England in *Khorasandjian v. Bush* [1993] QB 727 and in fact codified by the UK Parliament in their Protection from Harassment Act 1997 (providing protection from harassment and similar conduct) and the Protection of Freedoms Act 2012, and was also subsequently recognised by the High Court in Singapore in *Malcomson Nicholas Hugh Bertram & Anor v. Naresh Kumar Mehta* [2001] 4 SLR 454 – which grounds were accepted by our Federal Court in in *Mohd Ridzwan Abdul Razak* (*supra*). Thus, it is safe for this court

to regard them as authorities to hold that the tort of harassment exists in Malaysia. On that basis, I move on to examine the law on interlocutory prohibitory injunctions and its application to the facts of this case.

[22] In numerous reported judgments, the superior courts in Malaysia have discussed the general principles applicable for the issuance of interim injunctions. The most oft-quoted passages are from the judgment of the Court of Appeal in *Keet Gerald Francis Noel John v. Mohd Noor @ Harun Abdullah & Ors* [1995] 1 CLJ 293. Therein, guidance on the general inquiry to be undertaken when hearing an interlocutory injunction application, was worded as follows:

> [3] A Judge hearing an application for an interlocutory injunction should undertake an inquiry along the following lines:
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> (a) firstly, he must ask himself whether the totality of the facts presented before him discloses a bona fide serious issue to be tried;
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> (b) having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. In making his assessment, he must take into account all relevant matters, including the practical realities of the case;
>
> (c) the Judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the *status quo*.

[23] Based on the defendant's affidavit, I noted that the defendant did not deny having an intimate relationship with the plaintiff's husband. Further, as pointed out by the plaintiff in her affidavit in reply, the defendant did not expressly deny being the voice in those audio messages that the plaintiff received.

[24] I take judicial notice that some banks in Malaysia are using new voice recognition technology to verify the identity of customers who choose to use telephone banking services. This shows that it is possible, by using technology, to verify with a high level of certainty whether the voice in those abusive audio messages received by the plaintiff was that of the defendant. Since she has affirmed under oath that she recognises the voice to be of the defendant, the plaintiff would have to face the consequences if it turns out during the trial that the voice in the audio messages is very different from the defendant's voice and in fact not hers.

[25] I take the approach that if a plaintiff has affirmed under oath, stating with a high degree of certainty that a defendant was the sender of profanities and abusive messages, this court may act on that affidavit evidence, subject to undertaking to pay damages, to consider issuing an interlocutory

injunction to prohibit the defendant from further sending such messages. In this case, if the sender of those harassing messages was not the defendant, the prohibitory injunction would have no effect over her at all.

[26] Whether it was indeed the defendant's voice in those vulgar and abusive WhatsApp messages and whether she was the sender of those abusive emails, the truth shall prevail during a trial of the plaintiff's action. Likewise, the issue of whether she did stalk the plaintiff and her family – whether she was deliberately there to stalk or coincidentally there on those occasions when the plaintiff discovered the 'stalking'. The defendant shall have her day in court to prove her averments of being a victim of the plaintiff's husband, *et cetera*.

[27] Based on the affidavits filed by both sides, it is my judgment that for the purpose of the plaintiff's application for an interlocutory injunction, the plaintiff has shown serious *bona fide* issues to be tried, well satisfying the test set out by the Court of Appeal in *Keet Gerald Francis Noel John* (*supra*).

[28] On the issue of the balance of convenience and where the justice of the case lies, I am of the view that it favours the plaintiff because the evidence shows that she is suffering post-traumatic stress disorder (PTSD). As discussed above, if the culprit who sent those harassing messages was not the defendant, the prohibitory injunction would have no effect over her at all. The 'damage' that the defendant would suffer would be adequately compensated by an inquiry into damages pursuant to the plaintiff's undertaking to pay damages (which has been given) if so ordered by this court in the future, and an order for costs on indemnity basis to be paid to her by the plaintiff.

[29] In this case, I am of the view that damages would not be an adequate remedy for the plaintiff if she succeeds in proving her claim against the defendant. This is because if the defendant was the sender of those profanities and is not restrained by an injunction pending the trial of this action, the psychiatric ailment that the plaintiff has been suffering may reach an irreversible stage if the harassment is to continue unabated. I reiterate that if the defendant was not the culprit who sent those harassing messages, the prohibitory injunction would have no effect on her at all.

[30] As a matter of fact, the assessment of damages for mental harm is inherently inaccurate. In this case, it would be very difficult to assess the mental harm done to the plaintiff and her young children at the trial. The balance of convenience is certainly in favour of the issuance of an interlocutory injunction. Be that as it may, the scope of the injunction must not be restricted.

[31] I am aware that the law requires me to consider the hardship and inconvenience to the parties, how the interests of all the parties may best be protected pending trial, to weigh the ease or difficulty with which the

injunction, as sought, could be complied with, *ie*, the extent of hardship which compliance will cause to the defendant. The fundamental principle is as stated by the Federal Court in *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors* [1995] 1 CLJ 461; [1995] 1 MLJ 241:

> ... the grant or refusal of an interlocutory injunction must be decided on the fundamental principle that the court should take whichever course that appears to carry the lower risk of injustice.

[32] As I shall be hearing the trial of this action, in fairness to the defendant, I am keeping an open mind as to the possibilities that she might not have been the culprit who repeatedly sent those profanities, and that it might have been coincidental that the defendant was in the vicinity of the plaintiff's restaurant located along Jalan Sambanthan, Kuala Lumpur. I take judicial notice that Jalan Tun Sambanthan, Brickfields, is an area that is predominantly occupied by Malaysian shopkeepers and restaurateurs of Indian descent. It would be manifestly unjust to the defendant – who is a young Malaysian woman of Indian descent – to be restrained from shopping or dining in that area altogether. Protection of the plaintiff and her children must be balanced with the need to avoid punishing the defendant. I state again that this is a case which I believe *viva voce* evidence of the witnesses, subjected to cross-examination, would unravel half-truths that have been stated in the pleadings and affidavits.

[33] Applying the fundamental principle in *Alor Janggus* (*supra*), that "the court should take whichever course that appears to carry the lower risk of injustice", it is my judgment that it would be oppressive of the defendant if all the prayers in the plaintiff's application were to be allowed.

[34] The interlocutory injunction to be issued must be adequate to protect the plaintiff and her children pending the trial of this action but must not amount to an 'overkill', so much so that it stifles the defendant's life and activity unnecessarily. An example of this 'overkill' is prayer 2(b) of the plaintiff's notice of application: for an injunction to restrain the defendant from stepping within 100 metres of the three properties named in that prayer.

Conclusion

[35] In the circumstances, I decided to allow only prayer (2)(a) and (d) in the plaintiff's application. Prayer 2(a) is for an interlocutory injunction that restrains her from causing any harassment, nuisance or intimidation to the plaintiff and her three children, while prayer 2(d) restrains her from approaching, contacting or communicating with the plaintiff or her three children, whether directly or indirectly, whether through a telephone or electronic mail or any other social media platform. I did not include the plaintiff's husband as one of those persons to be protected by the injunction because there is evidence that he chose to remain in communication with the

defendant. In any event, I doubt the plaintiff's husband requires the protection of such an injunction. If the injunction is to include the plaintiff's husband, it might unfairly cause the defendant to be in contempt of court when communication is in fact initiated by the plaintiff's husband.

[36] The injunction in terms of prayer (2)(a) and (d) of the plaintiff's notice of application (encl. 4) is to be in force until the disposal of this civil suit or further order. As for costs, I am of the view that this court ought to order costs in the cause, and I so ordered.